

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA :
UNITED STATES COAST GUARD :
: DECISION OF THE
vs. :
: COMMANDANT
MERCHANT MARINER'S DOCUMENT :
NO. 423-82-9398 : ON APPEAL

Issued to: Michael A. Manuel, : NO. 2564

Appellant. :
_____:

This appeal has been taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By order dated February 19, 1993, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia revoked Appellant's merchant mariner's document. The revocation was based upon a finding of proved the charge of use of a dangerous drug. The specification supporting the charge alleged that on or about September 24, 1992, Appellant failed a chemical test for dangerous drugs, to wit: marijuana.

The hearing was held at Norfolk, Virginia on January 27, 1993. Appellant did not appear at the hearing. The Administrative Law Judge found Appellant had been adequately notified of the date and place of the hearing and proceeded with the hearing in absentia. The Administrative Law Judge entered an answer of "deny" to the specification and the charge alleging use of a dangerous drug.

After the hearing, the Administrative Law Judge rendered a Decision in which he concluded that the charge and specification had been found proved. He served a written Order on Appellant revoking merchant mariner's document No. 423-82-9398 and all other licenses and authorizations issued to Appellant by the Coast Guard. The Decision and Order was served on June 16, 1993. Appeal was timely filed on July 6, 1993.

APPEARANCE: Appellant, pro se.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned document, issued to him by the United States Coast Guard. On September 18, 1992, Appellant provided a urine specimen for a periodical medical exam at Internal Medical Specialists, Inc., Norfolk, Virginia. The specimen collector was a Licensed Practical Nurse and an employee of Internal Medical Specialists. The specimen was analyzed in accordance with applicable federal requirements. The specimen tested positive for marijuana.

Appellant appeared at the Coast Guard Investigations Department in Norfolk, Virginia on November 10, 1992, and was charged with use of a dangerous drug. Appellant signed a Notice of Hearing and Charges in the presence of the Investigating Officer. The Appellant was advised of the substance of the complaint, the nature of the proceedings, his rights as a person charged and the consequences of a failure to appear. The Notice of Hearing and Charges contained the date, time, and place of the hearing. This included information that any request to change

the time or place of the hearing must be made to the Administrative Law Judge. The Appellant was specifically informed in writing that if he failed to appear, the hearing could proceed in his absence and he would lose the opportunity to be heard.

The Investigating Officer called the Appellant's home on December 24, 1992, but was unable to reach Appellant. However, the Appellant's girlfriend informed the Investigating Officer that the Appellant was in Norfolk City Jail. According to the Investigating Officer, Appellant returned his call on December 28 or 29, 1992. During this conversation, the Investigating Officer reminded Appellant of the upcoming hearing date. Appellant left the Investigating Officer with the impression that he would soon be released and that he would be able to attend the hearing. TR at 12.

Appellant was incarcerated in Norfolk City Jail from November 30, 1992 until he was released on bond on March 12, 1993. Appellant did not inform the Administrative Law Judge that he could not make his scheduled January 27, 1993 hearing.

Appellant, however, denies any contact with the Investigating Officer. Appellant further alleges that on one occasion between the dates of January 5-15, 1993, he spoke with an office employee at the Coast Guard Marine Safety Office in Norfolk, Virginia and informed the employee he was in jail and would not be able to appear at his hearing unless the jail was notified.

OPINION

I

Appellant contends he justifiably was not able to be present during the hearing because he

was incarcerated. Thus, a hearing in absentia should not have been held. I disagree. It is clear from the record that Appellant had notice of the time and place of the hearing. Appellant also possessed the name, address and telephone number of the Administrative Law Judge and the information that to change the hearing date, application must be made to the Administrative Law Judge. TR at 1-14. The Investigating Office informed the Administrative Law Judge of the possibility that the Appellant was still incarcerated at the time of the hearing. TR at 12. The Administrative Law Judge noted

that the Appellant had not been in contact with him and that he was certainly entitled to write a letter if he was in jail.

TR at 14.

An Administrative Law Judge in the proper exercise of discretion, may conduct a hearing in absentia. 46 C.F.R.

§ 5.515(a); Appeal Decision 2263 (HESTER), 2234 (REINMANN). Here, the Administrative Law Judge invoked his authority to proceed in absentia only after he established that Appellant had been adequately notified of the time, date, and place of the hearing. TR at 24.

Appellant does not contend that he was not properly served with the notice of hearing. Rather, Appellant alleges that his incarceration prevented him from attending the hearing. I have previously held that a hearing conducted in absentia while the Appellant was incarcerated may be a nullity. Decision on Review 14 (RODRIGUEZ). However, the case before me today is distinguishable from Rodriguez on its facts. Rodriguez was taken into police custody on removal from his vessel, the same date of the alleged offenses. He was served by the Coast Guard Investigation Officer with the Notice of Hearing and Charges on the following day while still in jail. When the hearing was opened, it was known that the party could not appear at the Coast Guard Office because he was in jail for the offenses committed that were the basis of the Coast Guard charges against him. Despite this, proceedings began in absentia, and charges were found proved against Rodriguez. The hearing was then reconvened at the jailhouse in a hollow gesture to allow the party to make a statement.

I clearly stated in Rodriguez that I was not attempting to list all conditions under which a hearing while the Appellant was incarcerated would be appropriate. However, I did note that Rodriguez does not affect the propriety of a proceeding in absentia when the Appellant is jailed subsequent to the service of Notice of Hearing and Charges.

Here, I find conditions present which made an in absentia hearing appropriate. Appellant was incarcerated subsequent to his receipt of Notice of Hearing and Charges on November 10, 1992, on an entirely unrelated matter. There was no Coast Guard involvement or cooperation regarding his detention. While the Investigating Officer knew of Appellant's incarceration prior to the scheduled hearing, he was also lead to believe that the Appellant would be released prior to that scheduled hearing. It was not the duty of the Coast Guard or the Investigating Officer to monitor the Appellant's status or whereabouts following Notice of Hearing. Rather, the Appellant had ample time and opportunity to seek a change to the time and place of his hearing by making application to the Administrative Law Judge, not the officer serving the charge sheet or his office. This he failed to do. Appeal Decisions 2263 (HESTER), 2422 (GIBBONS). I stated in Appeal Decision 1688 (YOUNG), "[a]n examiner will hear any reasonable request for postponement. When he hears none, he has no choice but to proceed in absentia."

Appellant alleges that he contacted the Coast Guard Marine Safety Office in Norfolk, Virginia and informed an office employee of his inability to appear at the hearing "unless the

jail was notified". Appeal brief at 3. The Appellant is attempting to shift the burden and make the Marine Safety Office responsible for informing the Norfolk City Jail that the Appellant needs to attend a hearing. This is not the burden or responsibility of the Marine Safety Office.

Additionally, it shows the Appellant was able to use the telephone while incarcerated. It is the Appellant's responsibility and burden to appear at the hearing. If unable to appear, it is the Appellant's burden to arrange for representation or to advise the Administrative Law Judge in advance of his inability to appear. Failure to appear or to notify of an anticipated absence allows the Administrative Law Judge to properly proceed in absentia with no denial of due process.

Appeal Decisions 2234 (REIMANN), 2263 (HESTER), 2484 (VETTER); 5 C.F.R. § 5.515(a).

II

Appellant argues that revocation of his merchant mariner's document is excessive and constitutes cruel and unusual punishment, as prohibited by the Sixth Amendment. These proceedings are remedial, not penal in nature, intended to maintain standards for competence and conduct essential to the promotion of safety at sea. See 46 U.S.C. § 7701 and 46 C.F.R.

§ 5.5. As Commandant, I am not vested with the authority to decide constitutional issues. That is exclusively within the purview of the federal courts. See 4 Davis, Administrative Law Treatise, § 26.6 (1983); Appeal Decisions 2433 (BARNABY), 2202 (VAIL), 2546 (SWEENEY).

However, revocation has never been held

to constitute punishment much less "cruel and unusual punishment". Appeal Decision 1957 (DIAZ). Under 46 U.S.C.

§ 7703(c), once it is proven that a holder of a document has been a user of a dangerous drug, revocation is mandatory unless proof of cure can be shown. In entering the order of revocation, the Administrative Law Judge was following the mandate of the statute.

III

Appellant argues that the Investigating Officer's statements indicating he had a telephone conversation with the Appellant were false and unfairly prejudicial, as tending to show Appellant was unconcerned about his status as a documented merchant mariner. I disagree that the Appellant was prejudiced by any statements made by the Investigating Officer.

When Appellant failed to appear at the hearing and did not comply with the extension procedures, he effectively forfeited his right to impeach the credibility of the Investigating Officer, and to argue otherwise. Appeal Decision 2140 (FOMIC). Therefore, I find that the exchange that occurred between the Investigating Officer and the Administrative Law Judge afforded no prejudice to the Appellant as it is irrelevant to the decision herein rendered.

Furthermore, the statements made by the Investigating Officer merely informed the Administrative Law Judge of the possible whereabouts of the Appellant. The information received by the Administrative Law Judge was directly related to the issue of proceeding in absentia and, therefore, cannot be construed as

being prejudicial. The sanction awarded was not affected by statements made by the Investigating Officer to the Administrative Law Judge. As discussed in section II, a merchant mariner document must be revoked when the charge use of a dangerous drug is found proved. 46 U.S.C. § 7703(c). Thus, the sanction awarded by the Administrative Law Judge was not discretionary and, therefore, could not have been influenced by the statements of the Investigating Officer.

CONCLUSION

The Appellant was properly notified of the time, date and place of the hearing. He did not request a change in the date of the hearing from the Administrative Law Judge although he was provided with information on how to do so. Furthermore, the revocation of Appellant's merchant mariner's document is remedial and not punitive in nature and was proper. The Appellant was not prejudiced by the statements made by the Investigating Officer to the Administrative Law Judge concerning contact subsequent to the initial notice, as it was irrelevant to the issue of proper initial notice addressed in this appeal. It was also proper for the Administrative Law Judge to hold the hearing in absentia. I find the Administrative Law Judge's findings are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The Decision of the Administrative Law Judge dated at Norfolk, Virginia on 19 February 1993 is
AFFIRMED. The order of the Administrative Law Judge is AFFIRMED.

____ Robert E. Kramek _____

____ Admiral, U.S. Coast Guard _____
____ Commandant

Signed at Washington, D.C. this 24th day of March, 1995.